Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

DARCY TING, An Individual
And On Behalf Of All Others Similarly Situated, And
CONSUMER ACTION, A Non-Profit Membership Organization,
Both As Private Attorneys General,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held – contrary to *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002), the prior decisions of this Court, and the express provisions of the orders of the Federal Communications Commission ("FCC") – that, absent a tariff filing requirement, the lawfulness of the rates, terms, and conditions of interstate long distance services is not governed exclusively by §§ 201 and 202 of the Communications Act, but is subject to challenge under unconscionability and other laws of individual states?

PARTIES AND RULE 29.6 STATEMENT

The parties to the proceeding are listed in the caption. Pursuant to Supreme Court Rule 29.6, petitioner AT&T Corp. states that it has no parent company, and there is no publicly held company that owns 10% or more of AT&T's stock.

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PETITION FOR A WRIT OF CERTIORARI

AT&T Corp. ("AT&T") respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of court of appeals (Appendix ("App.") 1a-43a) is reported at 319 F.3d 1126 (9th Cir. 2003). The opinion of the District Court (App. 44a-110a) is reported at 182 F. Supp. 2d 902 (N.D. Cal. 2002).

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on February 11, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Sections 10, 201-208, and 254(g) of the Communications Act, 47 U.S.C. §§ 160, 201-208, and 254(g), are reprinted at App. 118a-129a.

STATEMENT OF THE CASE

In this case, the Ninth Circuit exempted California residents from the limitation of liability and consumer remedies provisions of the Consumer Services Agreement that had begun governing AT&T's national interstate long distance services on August 1, 2001 – which was the effective date of the orders of the Federal Communications Commission ("FCC") that ended the tariffing of these services under § 203 of the Communications Act. It was undisputed that these provisions of AT&T's contract are just, reasonable, nondiscriminatory, and lawful under §§ 201 and 202 of the

Communications Act and the FCC's rules and policies. The Ninth Circuit held, however, that the effect of the FCC's *Detariffing Orders* is that the lawfulness of the rates, terms, and conditions of interstate telephone services is now governed by state law. The Ninth Circuit further held that the challenged contractual provisions are "unconscionable" under California law, and it enjoined AT&T from enforcing them against California residents.

This decision conflicts with the holding of the Seventh Circuit on this same issue, with the prior decisions of this Court, and with the FCC's *Detariffing Orders* and its policies.

First, as the Ninth Circuit acknowledged (App. 10a-11a), its decision conflicts with the decision in *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002). The Seventh Circuit there held that §§ 201 and 202 of the Communications Act preempt unconscionability and other state law challenges to the rates, terms, and conditions of interstate long distance services following detariffing. The Seventh Circuit thus enforced under federal law the very provisions of the AT&T Consumer Services Agreement that the Ninth Circuit here invalidated under state law.

Second, the Ninth Circuit's decision conflicts with prior decisions of this Court. They hold that the ban on preferences and other terms of §§ 201 and 202 of the Act preempt state law challenges to contractual provisions that limit the liability of communications common carriers where, as here, the carriers are exempt from statutory tariffing requirements. *E.g, Western Union Tel. Co.* v. *Esteve Bros.*, 256 U.S. 566, 570-74 (1921); *Postal Tel. Cable Co.* v. *Warren Godwin Lumber Co.*, 251 U.S. 27, 30 (1919); see *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998).

Third, the Ninth Circuit's decision conflicts with the FCC's *Detariffing Orders* and with the FCC's policies. The FCC expressly held that its *Detariffing Orders* did "not affect" the operation of §§ 201 and 202 of the Act, that these statutory

provisions would "continue[] to govern" the "lawfulness" of the "rates, terms, and conditions" for interstate long distance services, and that state law would govern only "other issues, such as contract formation." *Interstate, Interexchange Marketplace*, 12 FCC Rcd. 15,014, 15,057 (¶ 77) (1997). Further, the FCC's policy is to rely on marketplace forces – not cost of service data or state law standards of unconscionability – to assure that the rates, terms, and conditions of interstate services are just and reasonable.

The resolution of these conflicts in this case is a matter of great national importance. Although the provisions of AT&T's Consumer Services Agreement currently apply to consumers in the Seventh Circuit (and elsewhere), the Ninth Circuit's decision means that these same provisions cannot apply to AT&T's 7 million long distance customers in California.

Further, the issue has importance beyond AT&T and its 40 million interstate long distance customers. The challenged provisions of AT&T's Consumer Services Agreement include arbitration requirements and bans on class actions which were previously imposed by tariffs by some carriers and which have become terms and conditions of the interstate services of virtually all major long distance carriers. That is the case because the FCC generally permits marketplace forces to determine the terms and conditions that long distance carriers offer and because consumers of long distance services place little value on judicial and class remedies and prefer the lower rates that these provisions allow carriers to offer. Review of the Ninth Circuit's decision and the resolution of the conflicts that it creates thus has profound importance for the entire long distance industry and for the federal laws that govern it.

1. The Regulation Of Interstate Long Distance Carriers. Federal law has governed the lawfulness of the rates, terms, and conditions of interstate telecommunications services since 1910. In that year, Congress subjected interstate telephone and telegraph carriers to some but not all of

the requirements of the Interstate Commerce Act (ICA) that previously applied only to railroads. Congress exempted long distance carriers from the requirement (§ 6 of the ICA) that they set forth the rates, terms, and conditions of their service in tariffs. At the same time, Congress subjected these carriers to the requirement that the rates, terms, and conditions of their services be "just and reasonable" (§ 1 of the ICA) and to the prohibitions against "unreasonable discrimination" (§ 2 of the ICA) and against extending any "unreasonable or undue preference or advantage to any person, class of persons, or localities" (§ 3 of the ICA).

Thereafter, this Court held that, even in the absence of any duty to file and adhere to tariffs, §§ 1-3 of the ICA and their ban on unreasonable preferences for any locality preempt state law challenges to any of the rates, terms, or conditions of interstate telecommunications services, including contractual provisions that limit a telecommunications carrier's liability to its customers.[1]

In the Communications Act of 1934 (47 U.S.C. §§ 151 *et seq.*), Congress transferred authority over interstate telecommunications services to the Federal Communications Commission (FCC). Congress also adopted substantive and procedural requirements that were copied, almost verbatim, from the Interstate Commerce Act – in order "to preserve the value of court and commission interpretation" of these provisions. H.R. Rep. No. 73-1850, at 4 (1934).

Section 201 of the Act codified the requirement (of § 1 of the ICA) that the "charges, practices, classifications, and regulations" of interstate telecommunications services be "just and reasonable." Section 202(a) codified both (1) the ban (of § 2 of the ICA) on any unreasonable discrimination in the "charges, practices, classifications, regulations, facilities,

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[1] *Western Union Tel. Co.* v. *Esteve Bros.*, 256 U.S. 566 (1921); *Postal Tel. Cable Co.* v. *Warren Godwin Lumber Co.*, 251 U.S. 27 (1919); *see Unrepeated Message Case*, 44 ICC 670 (1917).

or services" for or in connection with "like communication service" and (2) the prohibition (of § 3 of the ICA) against the making or giving of any "undue or unreasonable preference or advantage to any particular person, class of persons, or locality."

The Communications Act of 1934 also extended to interstate telecommunications carriers the same provisions for the filing and review of tariffs that previously had applied only to railroads. Section 203(a) required every common carrier to file tariffs containing all their rates, and all classifications, practices, and regulations affecting their rates. Section 203(c) prohibited carriers from charging any rates or extending to any person any privilege or classification, regulation, or practice affecting rates that was not specified in its filed tariff. Sections 204 and 205 of the Act allowed the FCC to review and to investigate tariff provisions in advance of their effective date and to order revisions to filed tariffs if it found that their provisions violated the substantive requirements of §§ 201 and 202 of the Act.

The Act also provides federal remedies to consumers who contest the lawfulness of the rates, terms, and conditions of interstate long distance services. It allows them to file complaints that the FCC is required to investigate and prosecute (§§ 206 & 208) or to file lawsuits in federal district courts (§ 207).

2. The FCC's Pre-1996 Policies Governing Competitive Long Distance Services. After competition was introduced into long distance services in the 1970s, the FCC modified – or attempted to modify – its regulations for "nondominant carriers," which the FCC defined as carriers lacking market power. AT&T was classified as a nondominant carrier in 1995, and all existing providers of long distance services are today classified as nondominant.

The FCC first exempted nondominant carriers from the requirements that they file their rates in advance of their

effectiveness or that they file or maintain cost data to support the rates and terms and conditions of their services. The FCC concluded that marketplace forces and other regulatory remedies would generally prohibit a carrier from adopting rates, terms, or conditions that are unjust and unreasonable or unreasonably discriminating in violation of §§ 201 and 202 and that there was no need for cost of service rate regulation of nondominant carriers. *Competitive Common Carrier Servs.*, 85 FCC 2d 1, 33-37 (¶¶ 97-106) (1980).

Thereafter, the FCC also sought to end tariff filings by nondominant carriers. The FCC concluded that marketplace forces and complaints for violations of §§ 201 and 202 could sufficiently guarantee compliance with these substantive provisions, and that tariffs were not necessary to enforce these provisions. *Competitive Common Carrier Servs.*, 91 FCC 2d 59, 71 (¶ 24) (1982). Although courts acknowledged that these FCC findings were reasonable, courts vacated these FCC orders on the ground that tariffs were then Congress's "chosen means" of enforcing §§ 201 and 202 and that the FCC then had no statutory authority to exempt carriers from these requirements. *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 230-31 & n.4. (1994).

3. The Telecommunications Act of 1996. In the Telecommunications Act of 1996 ("1996 Act"), Congress adopted federal requirements designed to foster competition in local and other *intrastate* telephone services that had previously been subject to the exclusive jurisdiction of state commissions and that were monopolies. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999). But the 1996 Act also adopted two amendments to the Communications Act that apply to the competitive *interstate* long distance services over which the FCC has exclusive jurisdiction.

First, Congress granted the FCC the authority to "forbear from applying . . . any provision of [the Act]" to particular carriers or services. 47 U.S.C. § 160(a). But Congress provided that the FCC may exercise this authority only if the

FCC finds (1) that enforcing the provision is not "necessary to ensure" that the rates, terms, and conditions of the service are "just and reasonable and are not unjustly or unreasonably discriminatory"; (2) that enforcing the provision is not necessary for the protection of consumers; and (3) that forbearing from enforcing the provision is in the public interest. *Id.*

Second, Congress enacted a new provision of the Act that is designed generally to maintain nationally uniform rates for all "interstate interexchange [*i.e.*, long distance] services" offered by each carrier. 47 U.S.C. § 254(g). Section 254(g) requires the FCC to adopt rules that "require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." *Id.*

4. The FCC's *Detariffing Orders.* On March 5, 1996, the FCC issued a notice of proposed rulemaking to adopt rules that would both implement § 254(g)'s uniform rate requirements and also "forbear" from applying the tariffing requirements of § 203 to the interstate long distance services of nondominant carriers. *Interstate, Interexchange Marketplace*, 11 FCC Rcd. 7141 (1996).

In its *First Report and Order*, the FCC implemented the rate uniformity requirements of § 254(g) by adopting rules that codified the FCC's existing interpretations of § 202(a) of the Act. *Interstate, Interexchange Marketplace*, 11 FCC Rcd. 9564, 9574-75 (¶ 21) (1996). These rules generally require carriers to provide long distance service at the same standard rates throughout the nation. But they also permit carriers to meet competition by offering services that provide discounts from basic rate schedules and specialized services to meet the needs of large customers so long as they are available to all "similarly situated" customers "regardless of their geographic location." *Id.* at 9576-77 (¶¶ 24 & 27).

In its *Second Report and Order*, the FCC exercised its forbearance authority to prohibit nondominant carriers from filing tariffs for interstate long distance services. *Interstate, Interexchange Marketplace*, 11 FCC Rcd. 20,730 (1996). It reasoned, again, that tariff filing requirements are not necessary to ensure that long distance rates, terms, and conditions are just, reasonable, and nondiscriminatory. It found that marketplace forces will generally prevent carriers from offering rates, or imposing terms and conditions, that violate §§ 201 or 202 of the Act, and that if carriers nonetheless did so, the complaint process under § 208 of the Act constitutes a "more effective means of remedying such conduct" than does tariff filings. *Id.* at 20,742-43 (¶ 21). The FCC further found that tariff filings were unnecessary to provide customers with the information required to enforce §§ 201 and 202, and the rate averaging requirement of § 254(g), and the FCC adopted alternative means of enforcing these requirements. *Id.* at 20,745-46 (¶ 25) & 20,776 (¶ 84).

The FCC also found that the public interest required banning the filings of tariffs. It primarily relied upon the ground that banning tariffs would halt application of the so-called "filed-tariff doctrine" that is mandated by § 203(c) of the Act and that fictitiously presumed that customers have knowledge of the terms of filed tariffs. *Id.* at 20,762 (¶ 55). This doctrine had harsh consequences of binding customers to different rates, terms, and conditions than carriers had promised them orally or in writing. *Id.* at 20,754 (¶ 45) n.122 (citing *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)). Because customers were presumed to know all a carrier's tariffed rates and terms, the doctrine had been further held to preclude suits seeking prospective injunctive relief against deceptive advertising. *Marcus* v. *AT&T Corp.*, 138 F.3d 46, 64-65 (2d Cir. 1998).

The FCC emphasized that, in a detariffed regime, carriers would provide customers with actual notice of the rates, terms, and conditions on which the carriers offered service,

and customers would have to take steps sufficient to accept these offers under state contract law before the customer would be bound to them. The FCC anticipated this requirement would impose only modest costs on carriers, for they could enter into contracts with the nation's millions of residential customers by mailing "short, standard-form contracts." *Interstate, Interexchange Marketplace*, 11 FCC Rcd. at 20,763 (¶ 57). The FCC stated that if that assumption proved incorrect, the FCC would consider reimposing tariffing obligations. *Id.* at 20,767 (¶ 64).

Nowhere in the *Second Report and Order* did the FCC forbear from enforcing the substantive requirements of §§ 201 and 202 and authorize state-by-state variations in rates, terms, and conditions of interstate services. To the contrary, the FCC stated that its "decision to forbear from requiring nondominant interexchange carriers to file tariffs for interstate, domestic interexchange services will not affect such carriers' obligations under Sections 201 and 202" (*id.* at 20,746-47 (¶ 27)) and will not prevent the effective enforcement of the interstate rate averaging requirements of § 254(g). *Id.* at 20,776 (¶ 84).

At the same time, however, the FCC had also stated that "[i]n the absence of such tariffs, consumers . . . w[ould] also be able to pursue remedies under state consumer protection and contract laws." *Id.* at 20,753 (¶ 42). To prevent any future claim that the *Second Report and Order* authorized state regulation of the rates, terms, or conditions of interstate long distance services, AT&T petitioned for clarification of this aspect of the FCC's Order.

In its *Order on Reconsideration*, the FCC described AT&T's petition as a request that the FCC "clarify that federal, and not state, law governs the determination as to whether a nondominant interexchange carrier's rates, terms, and conditions . . . are lawful." *Interstate, Interexchange Marketplace*, 12 FCC Rcd. at 15,056 (¶ 76). As the FCC stated, AT&T's contention was that any other result "is

foreclosed by numerous judicial decisions recognizing that sections 201 and 202 of the Communications Act preempt state law with respect to the reasonableness of rates, terms, and conditions for interstate telecommunications services." *Id.* Sprint and WorldCom supported AT&T's petition.

The FCC granted AT&T's petition. *Id.* at 15,057 (¶ 77). After reiterating its prior statements that detariffing "will not affect" §§ 201 and 202, the FCC stated:

> We therefore agree with AT&T, Sprint, and WorldCom that the Communications Act continues to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are just and reasonable, and are not unjustly or unreasonably discriminatory. While the parties only sought clarification that the Communications Act governs the determination as to the lawfulness of rates, terms, and conditions, we note that the Communications Act does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the *Second Report and Order*, consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime.

Id. The FCC's *Detariffing Orders* were upheld on appeal. *MCI Worldcom Network Servs., Inc.* v. *FCC*, 274 F.3d 542 (D.C. Cir. 2001).

Thereafter, the FCC set August 1, 2001, as the effective date for detariffing.

5. AT&T's Consumer Services Agreement. To implement its detariffing obligations, AT&T developed a national Consumer Services Agreement ("CSA") that set forth the rates, terms, and conditions on which AT&T offers interstate long distance service to residential subscribers throughout the nation. In May and June of 2001, AT&T mailed each of its 40 million customers a copy of the CSA together with an

explanatory cover letter and a set of anticipated "Frequently Asked Questions" (FAQs). AT&T's mailing told its customers that their use of AT&T's interstate long distance service on or after August 1, 2001 would constitute their "acceptance" of the rates, terms, and conditions that AT&T offered in the CSA. ER 398-406.

The CSA contains ten separately numbered and captioned sections, with some terms emphasized in upper-case letters and/or bold print. ER 400-01. Two of these sections were challenged below and invalidated in whole or in substantial part by the Ninth Circuit.

Section 4, captioned "**LIMITATIONS OF LIABILITY**," sets forth limitations on consumers' damages remedies. *Id.* It, among other things, limits AT&T's liability for negligence by barring any awards of indirect or consequential damages, by limiting damages for harm to persons or property to direct damages, and by limiting damages for other injuries to the amount of AT&T's charges for its services. AT&T intended Section 4 to carry forward the same limitations on liability for negligence that had previously been set forth in AT&T's tariffs and that the FCC had previously approved. *AT&T Co.*, 76 F.C.C.2d 195, 197 (¶ 5) (1980). ER 31, 35-38, 923-24.

Section 7 is entitled "**DISPUTE RESOLUTION**." Although it preserves the right of consumers to file complaints with the FCC or to bring actions in small claims court, it provides that any other disputes must be resolved through arbitration. Section 7 expressly provides that "[n]o disputes may be joined" "with a dispute of another person" or "resolved on a class-wide basis." ER 401, 434. Section 7 also sets a limitations-period of two years for bringing claims, provides for AT&T's payment of all but $20 of the costs of arbitration claiming less than $1,000 (later increased to $10,000), and provides that arbitrations will be confidential. ER 400, 434-35.

Arbitration clauses (including class action bans) had been adopted in the tariffs of some of AT&T's long distance competitors prior to the effective date of the FCC's *Detariffing Orders*. However, AT&T did not adopt these provisions until the effective date of these *Orders*. In AT&T's cover letter to its customers and in the accompanying list of anticipated frequently asked questions, AT&T identified the arbitration requirement as a new term of AT&T's service. ER 398-99.

6. The Proceedings Below. On July 31, 2002, plaintiffs Darcy Ting (an AT&T customer) and Consumer Action (a membership organization) instituted an action in California Superior Court to enjoin the enforcement of the Consumer Services Agreement against California residents. Plaintiffs contended that AT&T had taken insufficient steps to make the CSA a binding contract with AT&T's long distance customers under California law and that even if a contract had been formed, Sections 4 and 7 of the CSA were unlawful.

Plaintiffs did not contend that Sections 4 and 7 were "unjust, unreasonable, and discriminatory" in violation of §§ 201 or 202 of the Communications Act or any other provision of federal law.[2] Rather, they contended that the provisions were unconscionable under California law because they were contracts of adhesion and were one-sided. Plaintiffs also contended that the CSA's provisions violated the antiwaiver provision of the California Consumer Legal Remedies Act and the public policy of California.

AT&T removed the case to the United States District Court for the Northern District of California. In addition to

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[2] The FCC's rules specifically allow customers and carriers to agree to resolve disputes through arbitration. 47 C.F.R. § 1.18. The FCC has further concluded that the right of customers to file individual complaints before the FCC protects all their legitimate interests, and the FCC refused to authorize complaints to proceed as class actions because that would be inconsistent with the remedial scheme of the Act. *Krauss* v. *MCI Telecomms. Corp.*, 14 FCC Rcd. 2770, 2775-76 (¶ 10) (1999).

contending that state law is completely preempted by §§ 201 and 202 of the Communications Act, AT&T relied on the fact that the case could have been brought in federal district court under diversity of citizenship jurisdiction (28 U.S.C. § 1332) and that AT&T is not a citizen of California. *Id.* § 1441(a) & (b); see ER 23-28.

AT&T demonstrated that its CSA mailing had provided California customers with sufficient notice of the CSA to cause their subsequent use of the service to constitute acceptance of an offer and to form a contract under California state law. But AT&T contended that §§ 201 and 202 governed the lawfulness of Sections 4 and 7 of the CSA and preempted plaintiffs' substantive state law challenge to these limitation of liability and consumer remedies provisions.

Following a trial, the District Court entered an injunction that generally treated the CSA as a validly formed contract. However, it rejected AT&T's federal preemption claims (App. 100a-105a), and it held that Sections 4 and 7 violated state law.

First, the District Court held that the limitation of liability clause of Section 4 covered not just negligence (as AT&T contended) but also violated California law by limiting liability for willful misconduct. Because the Court concluded it had no authority under state law to "rewrite or reform" Section 4, it enjoined its application entirely. App. 77a-83a. Under the court's order, there is no limitation on AT&T's liability to California customers for consequential or economic damages caused by negligence from August 1, 2001 until AT&T adopted a new limitations of liability clause in response to the District Court.

Second, the District Court found that the arbitration provisions of Section 7 of the CSA, including the class action prohibition, were unconscionable because the CSA is an adhesion contract and these provisions are one-sided. After finding that individual FCC complaints were not an adequate

remedy for consumers (App. 71a), the District Court found the class action prohibition one-sided and oppressive because it would "serve to shield AT&T from liabilit[ies]" it would incur if there were no such ban. *Id.* at 68a, 91a-92a. It found the cost provisions one-sided because the District Court hypothesized claims in which customers would incur greater fees in arbitration than would be incurred in court cases. *Id.* at 96a-98a. While the District Court found that the two-year limitation period was not unconscionable, it invalidated that term under the anti-waiver provisions of the California Consumer Legal Remedies Act. *Id.* at 84a.

7. The Ninth Circuit's Decision. While it held that the two-year limitations period is valid, the Ninth Circuit upheld the District Court's invalidation of the CSA's limitation of liability clause and its arbitration requirements and class action ban. The court acknowledged that AT&T's preemption claims were accepted in *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002) and that the Seventh Circuit had enforced the CSA's legal remedies provisions after dismissing state law unconscionability challenges to them. But the Ninth Circuit "respectfully disagreed" with the Seventh Circuit, and the Ninth Circuit rejected AT&T's preemption claims on two alternative grounds. App. 11a.

First, it held that AT&T's preemption claim is contrary to the "text and structure" of the Communications Act of 1934 and "the clear intent of Congress in the Telecommunications Act of 1996." App. 11a. It concluded that the decisions holding that the Communications Act (and the Interstate Commerce Act) preempt state law challenges to rates, terms, and conditions of interstate communications (and transportation) services rested solely on the existence of tariffs, and that, absent a tariff, state law invalidations of the terms and conditions for a rate do not constitute unreasonable preferences in violation of § 202(a). *Id.* at 16a-25a. It further held that the 1996 Act's "chosen means" of enforcing §§ 201 and 202 is to "deregulate" the services and rely on marketplace

forces which, the Ninth Circuit held, include the operation of state laws of general applicability. *Id.* at 22a-32a.

Second, the Ninth Circuit held, in the alternative, that AT&T's preemptive claim was foreclosed by the District Court's findings of fact. The Ninth Circuit relied on the District Court's conclusion that AT&T had failed to prove that class action and other lawsuits would increase AT&T's costs of service and, if so, by how much, and the court held that the absence of such evidence foreclosed any claim that the invalidation of the provisions created preferences in favor of California customers. App. 32a-33a.

Finally, the Ninth Circuit held that the CSA's limitation of liability and consumer remedies provisions are unconscionable under California law, which required findings that the CSA is both "procedurally" and "substantively" one-sided and unfair. The court held that the procedural prong was satisfied because the CSA is an adhesion contract and because virtually all long distance carriers have similar provisions App. 36a-37a. The court held the substantive prong was satisfied because the CSA's provisions were not "reciprocal" as a practical matter because, for example, they barred plaintiffs from bringing class actions against AT&T, whereas AT&T would have little reason to pursue judicial claims against a class of its customers. *Id.* at 37a-42a.

REASONS FOR GRANTING THE PETITION

Review of the Ninth Circuit's decision is manifestly appropriate. First, it creates a square and acknowledged conflict with the Seventh Circuit not only on the broad questions of the preemptive effect of §§ 201 and 202 of the Communications Act following detariffing, but also on the specific question of the validity of the remedial provisions of AT&T's national Consumer Services Agreement. Second, the Ninth Circuit's decision conflicts with prior decisions of this Court, which establish that the Seventh Circuit is right

and the Ninth Circuit is wrong. Finally, the issues have importance beyond AT&T and its 40 million interstate long distance customers. The Ninth Circuit's decision would invalidate the comparable provisions in the contracts of virtually all of the nation's major long distance carriers. It would also subvert the FCC's policy of allowing marketplace forces to determine the rates, terms, and conditions of interstate service, subject to FCC intervention only in the event of market failures.

I. THE NINTH CIRCUIT DECISION SQUARELY CONFLICTS WITH THE SEVENTH CIRCUIT'S DECISION IN *BOOMER* v. *AT&T*.

Foremost, as the Ninth Circuit expressly acknowledged (App. 10a-11a), its decision conflicts with *Boomer* v. *AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002). Two courts of appeals have now squarely disagreed over the meaning of the FCC's *Detariffing Orders* and the preemptive effect of §§ 201 and 202 of the Communications Act in a detariffed environment. They have also disagreed over the validity of the Legal Remedies Provisions of AT&T's Consumer Services Agreement. This has created the anomaly that a single national contract applicable to interstate services is enforceable under federal law (and immune from state law challenges) in one circuit and invalid under state law in another. It means that rates, terms, and conditions applicable to a single AT&T interstate call (*e.g.*, Chicago to San Francisco) now vary depending on where the call is billed.

The conflict could not be starker. The plaintiffs in this case and the plaintiffs in *Boomer* each contended that the Legal Remedies provisions of the CSA were unconscionable under state law. Each advanced identical arguments in contending that state law challenges to the CSA's rates, terms, and conditions were not preempted under §§ 201 and 202 of the Communications Act and the terms of the FCC's *Detariffing Orders*. Yet the two courts reached opposite conclusions, and

each offered extended and detailed analyses in support of their respective and opposite holdings.

The Seventh Circuit had previously held that the Communications Act preempted state law challenges to arbitration clauses (including class action bans) that were set forth in tariffs and that these clauses are valid and must be enforced unless and until the FCC finds they violate §§ 201 or 202 of the Act. *Metro East Ctr.* v. *Qwest Communications Int'l, Inc.*, 294 F.3d 924 (7th Cir.), *cert. denied*, 123 S. Ct. 707 (2002). In *Boomer*, the Seventh Circuit held that §§ 201 and 202 of the Act continue to preempt state law challenges to these provisions now that they are set forth in contracts, for three independent reasons. 309 F.3d at 418-21.

First, it held that the object of §§ 201 and 202 was to achieve uniform rates, terms, and conditions for interstate telecommunications services and that allowing state law challenges to terms and conditions would result in state-by-state differences among similarly situated customers, contrary to § 202(a)'s prohibition against unreasonable preferences for any class of customers or locality. *Id.* at 418. Second, it concluded that arbitrations and class action bans produce cost savings for carriers that are passed through to consumers in the form of lower rates, and that to allow state law injunctions against these provisions would inevitably result in either price differences from state to state or in price discrimination among otherwise similarly situated customers that violates § 202(a). *Id.* at 419-20. Third, the Seventh Circuit held that, in this context, § 201(b) shows that Congress intended that federal law would exclusively govern the question whether rates, terms, and conditions of service are fair and reasonable and preempt unconscionability and other state claims that address the same ultimate questions under state law standards. *Id.* at 420-21.

The Seventh Circuit rejected claims that the preemptive effect of the Communications Act depended upon the existence of tariffs or on the applicability of the filed rate

doctrine. *Id.* at 421-22. It further held that the FCC's *Order on Reconsideration* established that state law in no way applies to determinations of the lawfulness of rates, terms, and conditions of interstate services. *Id.* at 423.

The Ninth Circuit has now "respectfully disagreed" with all of the Seventh Circuit's conclusions, calling them "novel." App. 10a-11a. The Ninth Circuit held that the only circumstance in which the Communications Act preempts state law is where tariffs are required or permitted and the filed tariff doctrine applies. *Id.* at 17a-18a. It held that, absent tariffs, a state law injunction that exempts its citizens from the rates, terms, and conditions of a national interstate service does not result in unreasonable preferences for a locality that violate § 202(a). *Id.* at 16a-25a. To the contrary, the Ninth Circuit held that state-by-state variations in results are dictated by the 1996 Act which purportedly "deregulated" interstate services and thereby necessarily provided that §§ 201 and 202 would be enforced by applying the laws of 50 different states to establish the rates, terms, and conditions that would govern long distance services in each state. *Id.* at 24a-27a. The Ninth Circuit treated the FCC's grant of AT&T's petition for clarification that §§ 201 and 202 would continue to govern these issues as confirming this role for state law. *Id.* at 28a.

Finally, the Seventh Circuit had held as a matter of law that limitation-of-liability provisions and arbitration requirements and class action bans affect a carrier's costs and rates, such that a state law injunction against these provisions would necessarily result in price discrimination and lead to unreasonable preferences. *Boomer*, 309 F.3d at 419-20. But the Ninth Circuit concluded that the Seventh Circuit's decision to so hold in the absence of a "factual record" was improper and that the District Court's findings here established that invalidating the limitations of liability and consumer remedies provisions had no such effects. App. 32a-33a.

These conflicting legal holdings – and the fact that important provisions of a single national contract are valid in some states but not in others – make review by this Court a matter of great importance. In this regard, because the Seventh and Ninth Circuit's have sharply framed the issues in detailed opinions that reach opposite results, the question presented in this case is manifestly now ripe for this Court's consideration and decision.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND IS CLEARLY WRONG.

Even apart from the square conflict with the Seventh Circuit's decision in *Boomer*, this case merits plenary review because the Ninth Circuit's decision also conflicts with the prior decisions of this Court. They establish that the Seventh Circuit is right and the Ninth Circuit is wrong.

First, the Ninth Circuit's decision primarily rests on its view of the "text and structure" of the Communications Act of 1934. App. 11a. It held that the only provision of the Communications Act that preempts state law is § 203, and the "filed rate doctrine" that implements it. But this holding has been squarely rejected by nearly a century of decisions of this Court that hold that the terms of §§ 201 and 202 independently preempt state law challenges to the rates, terms and conditions of interstate services, whether or not the carrier is subject to the tariffing requirements of § 203.

These decisions reject the Ninth Circuit's conclusion that the text of the Act gives § 203 a "preemption function" but merely gives §§ 201 and 202(a) an "antidiscrimination function." App. 18a. In this regard, the so-called "filed tariff doctrine" was compelled by the text of § 203(c), which prohibits carriers from providing services at rates, terms, or conditions that are not "specified" in its tariff. This provision was held to preempt state law that would invalidate tariffed limitations on liability because state laws cannot require what

federal law prohibits. *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998). Section 202(a) of the Act, in turn, prohibits carriers from extending unreasonable preferences to any class of customers or localities, and the Court has thus held that the Act also preempts state-law claims that "constitute unlawful preferences." *Id.*

Indeed, this Court repeatedly so held during a prior period when telephone and telegraph carriers were subject to the same regulatory regime that applies to them now by virtue of the FCC's *Detariffing Orders*. Between 1910 and 1934, as now, telecommunications carriers were exempt from tariffing requirements and were subject to the statutory prohibitions against unjust and unreasonable rates, terms, and practices (now codified in § 201(b)) and against undue or unreasonable preference or advantages for any class of customers or locality (now codified in § 202(a)). This Court then held that these latter provisions invalidated state law challenges not just to rates, but also to contractual provisions that limit a carrier's liability to its customers and that had been challenged as unconscionable or contrary to public policy under state law.

In *Postal Telegraph-Cable Co.* v. *Warren Godwin Lumber Co.*, 251 U.S. 27 (1919), there was no tariff, and a customer brought a state law challenge to a "contract" that limited the carrier's liability for missending a message. *Id.* at 29. The Court held that the Act of Congress that required telegraph carriers to adhere to the requirements now codified in §§ 201 and 202 was "clear[ly] . . . designed" to subject telegraph companies to the "rule of equality and uniformity of rates" and that the Act's purpose would be "wholly destroyed" if the substantive lawfulness of the terms of contracts made in their interstate business were subject to state laws that inevitably may be "divergent" and "conflicting." *Id.* at 30. It held that the predecessors of §§ 201 and 202 were "an occupation of the field by Congress." *Id.* at 31.

Similarly, in *Western Union Telegraph Co.* v. *Esteve Bros.*, 256 U.S. 566 (1921) (Brandeis, J.), a telegraph carrier's

limitation on liability was invalidated under state law, and the Court reversed because state law had "grant[ed] an undue preference or advantage" in violation of the predecessor to section 202(a) of the Act. *Id.* at 571.

The Ninth Circuit tried to distinguish these cases on the ground that the ICA purportedly contained requirements governing "voluntary" tariff filings. App. 19a. That is incorrect. There was no such provision in the ICA, and while a tariff was voluntarily filed in *Esteve Brothers*, there was none in *Postal Telegraph*. More to the point, there was no statutory basis for giving preemptive effect to any voluntary tariffs, for the ICA's tariffing requirements and the ban on deviations from filed tariffs were then inapplicable to telecommunications carriers.

Thus, it had been "strongly argued" in *Esteve Brothers* that the limitation on liability clause could be subject to state law challenges because telegraph carriers had the right to provide service "without filing tariffs with the Commission." 256 U.S. at 572-73. But Justice Brandeis's opinion for the Court held that the absence of tariff filing requirements was immaterial to the preemptive effect of the Act. It concluded that tariff filings are merely "procedural features" of the Act that create the "fiction" that customers have "constructive notice" and that bind customers to the tariffed terms "whether there is knowledge of [them] or not." *Id.* at 573. It held that the preemptive effect of the Act "flows" not from the filing of the tariffs, but "from the requirement of equality and uniformity of rates laid down in § 3 of the [ICA]" (now § 202(a) of the Communications Act). *Id.*

Further, this Court has also held that even when limitation of liability clauses are set forth in tariffs, state law challenges to them are independently preempted *both* by the terms of § 203(c) and by § 202(a)'s ban on unreasonable preferences. *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155, 165 (1912) (state law claim for better terms than those in the tariff is preempted both by § 6 of the ICA (predecessor to § 203)

because terms were not "published in the tariffs," *and* by § 3 of the ICA (predecessor to § 202(a)) "because it is an undue advantage" not available to all similarly situated customers); *Davis* v. *Cornwell*, 264 U.S. 560, 562 (1924) (same).

AT&T Co. v. *Central Office Tel., Inc.*, 524 U.S. 214 (1998) ("*COT*") followed these decisions and held that tariff filings are not the sole source of state-law preemption. As the Ninth Circuit correctly states (App. 19a), this Court there applied the filed-tariff doctrine to reject COT's claim that it could bring state contract and tort claims to obtain "privileges" not specified in the applicable tariffs. 524 U.S. at 224-26. But the Ninth Circuit ignored that COT also argued, in the alternative, that its state-law claims were "consistent" with the tariffs because it authorized state claims based on willful misconduct. *Id.* at 228. The Court held that while such a state claim is not barred by the filed-tariff doctrine, it is barred by the FCA's separate ban on "preferences" (*id.*) which is contained in § 202(a). It "renders the promise of preferences unenforceable." *Id.*

These decisions also foreclose the Ninth Circuit's reliance on the ground that § 202(a) does not mandate "strict uniformity," but prohibits only "unjust or unreasonable" preferences. App. 19a-21a, 28a-30a. The Ninth Circuit here noted the FCC and other decisions that upheld rate differences that were justified by differences in competitive conditions and other such neutral rational factors. *Id.* But the decisions hold that § 202(a) requires that identical rates, terms, and conditions be extended to all customers facing similar competitive and other conditions, regardless of the state in which they reside,[3] and *Postal Telegraph*, *Esteve Brothers*, *Davis*, *Kirby*, and *COT* all reject the Ninth Circuit's holding that preferences that result from the operation of state law are "reasonable" and lawful under § 202(a).

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[3] *See, e.g.*, *Interstate, Interexchange Marketplace*, 11 FCC Rcd. at 9576-78 (¶¶ 24 & 27-28); *Interstate, Interexchange Marketplace*, 6 FCC Rcd. 5880, 5900-01 (¶¶ 112 & 116) (1991).

Further, this Court's decisions also foreclose the Ninth Circuit's alternative holding that California law could not be held to create a preference because AT&T purportedly had not introduced evidence that invalidation of the limitation of liability and consumer remedy provisions would increase AT&T's costs and rates and if so, by how much. App. 32a. There was no such evidence in *Postal Telegraph*, *Esteve Brothers*, *Davis*, *Kirby*, and *COT*, and this Court there held that limitations of liability provisions and other conditions that carriers impose on the availability of a rate are "inherent part[s] of the rate." *Esteve Bros.*, 256 U.S. at 571. In particular, the Court held that it was sufficient to establish an unreasonable preference that the plaintiff was seeking to use state law to confer an advantage that "affects the value of the service to the [customers] and its cost to the carrier" and that is something for which a carrier "might" justify a higher rate. *Kirby*, 225 U.S. at 165.

Here, moreover, one of the invalidated provisions of the CSA (Section 4) is the same limitation of liability clause that the Court specifically held to be an "inherent part" of the rate in *Esteve Brothers*. And it is self-evident – as the district court specifically found – that the arbitration clause and class action ban of the CSA operate to reduce AT&T's costs and to "shield" AT&T from substantial liabilities that it would otherwise incur. App. 67a-68a. For example, the class action ban inherently prevents awards of damages to customers who have not availed themselves of the costless right to file a complaint under § 208 of the Act that the FCC is required to investigate and prosecute or to pursue other remedies under the CSA. Under this Court's decisions, state law exemptions from the foregoing provisions are unreasonable preferences as a matter of law – as the Seventh Circuit correctly held in *Boomer*, 309 F.3d at 423.

Second, the Ninth Circuit's holding also rests on its view that the "clear intent" of the Telecommunications Act of 1996 requires allowing state law challenges to the rates, terms, and

conditions of interstate services. App. 11a. But this holding, too, conflicts with this Court's decisions, and is simply wrong.

The Ninth Circuit's holding principally rests on a misreading of this Court's decision in *MCI Telecommunications Crop.* v. *AT&T Co.*, 512 U.S. 218 (1994). Because this Court held that tariffs were Congress's "chosen means" of enforcing §§ 201 and 202 under the 1934 Act, the Ninth Circuit concluded that §§ 201 and 202 will be unenforceable under the detariffed regime authorized by the 1996 Act unless state law is allowed to impose just and reasonable arrangements. App. 22a-25a. But contrary to the Ninth Circuit, the Court's opinion in *MCI* v. *AT&T* expressly stated that it was *not* holding that it would "frustrate" the "ultimate purposes" of §§ 201 and 202 to end tariffing and to rely on marketplace forces and FCC complaints to enforce these provisions. 512 U.S. at 231 n.4. Rather, the Court held that because tariffs were then Congress's prescribed "means" of enforcing the provisions, the FCC could not then eliminate them even if §§ 201 and 202 would be adequately enforced through other means. *Id.*

The Ninth Circuit also confused two different sets of provisions that were enacted by the 1996 Act. The Ninth Circuit stated that the 1996 Act had the objective of "replac[ing] the old monopoly-based regime" with a system of deregulation that depends on market-based mechanisms and the operation of state law. App. 22a. The Ninth Circuit here cited to the legislative history and terms of the local competition provisions enacted by the 1996 Act (47 U.S.C. §§ 251-261), which govern local and other *intrastate* services that had been regulated exclusively by states, that had been monopolies, and that will continue otherwise to be subject to state law after new procompetitive federal requirements are fully implemented. See App. 26a (citing *Verizon Communications, Inc.* v. *FCC*, 122 S. Ct. 1646 (2002)). These provisions do not apply to *interstate* long distance services, which

had been subject to exclusive FCC jurisdiction and which were competitive when the 1996 Act was passed.

Rather, the 1996 Act altered the regulation of *interstate* long distance services in only two respects. Neither evinced any intent that state law would govern the rates, terms, and conditions of these services. First, by enacting § 254(g) and mandating nationally uniform interstate rates, Congress plainly was not authorizing the state-by-state variations that the Ninth Circuit's holding would create, and the FCC's implementing rules require identical rates for all similarly situated customers, "regardless of their geographic location." *Interstate, Interexchange Marketplace*, 11 FCC Rcd. at 9576-77 (¶¶ 24 & 27).

Second, while the Act grants the FCC the authority to "forbear" from applying any provision of the Act, Congress limited this forbearance authority to conditions in which the FCC found that the requirement is not necessary to assure that rates, terms, and conditions of service are just, reasonable, and nondiscriminatory and that forbearance is in the public interest. 47 U.S.C. § 160(a). As the Seventh Circuit held, this provision establishes that, if anything, the FCC is prohibited from forbearing from enforcing §§ 201 and 202 and allowing state-by-state variations in rates, terms, and conditions of interstate services by turning these matters over to state law. *Boomer*, 309 F.3d at 423. But that issue need not be reached here because the FCC exercised its forbearance authority only over § 203. Thus, even if the FCC had said nothing else on the subject, its orders would not have affected the enforcement of §§ 201 and 202, and they would have continued to preempt state law challenges to limitations of liability clauses and other rates, terms, and conditions of interstate services.

But the FCC did more. In granting AT&T's petition for clarification on this precise issue, the FCC "agreed" with AT&T that the lawfulness of the rates, terms, and conditions of interstate long-distance services would continue to be

governed by §§ 201 and 202 and that state law could only govern other issues that arose because of detariffing, such as contract formation. For the reasons stated above, this interpretation of the Act was compelled by the Act's terms and structure and by *Esteve Brothers* and other prior decisions of this Court that so interpret this same language in the absence of a tariff-filing requirement. See *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). But even if the Act were ambiguous, the FCC's order plainly adopted a reasonable interpretation, to which the Ninth Circuit would have been required to defer even if the Ninth Circuit had reviewed the FCC's order on direct appeal. *Chevron USA, Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Here, moreover, the Ninth Circuit did not review the FCC's order directly. Instead, it has effectively collaterally attacked the FCC's rules and its interpretation of the Act in a subsequent proceeding that challenged AT&T's implementation of these rules – based on the Ninth Circuit's mistaken view that the 1996 Act required a greater role for state law than afforded it by the FCC's *Detariffing Orders*. This is flatly improper.

III. UNLESS REVERSED, THE NINTH CIRCUIT'S DECISION WILL ADVERSELY AFFECT THE ENTIRE LONG DISTANCE INDUSTRY AND SUBVERT THE FCC'S REGULATION OF IT.

Finally, review of the Ninth Circuit's decision is a matter of national importance for other reasons. Unless reversed, the Ninth Circuit's decision will adversely affect the entire long distance industry and subvert the FCC's regulation of it.

First, the provisions of the CSA that the Ninth Circuit invalidated are comparable to the terms and conditions of the long distance services of many other long distance carriers. App. 60a. In particular, all of the nation's major long distance carriers have adopted standard form contracts and most contain some form of requirement that residential

customers arbitrate complaints that are not brought before the FCC and that prohibit class actions. *Id.* Under the Ninth Circuit's decision in this case, these provisions are all subject to challenge under the law of each state where each carrier operates, and would appear all to be plainly unlawful under the Ninth Circuit's interpretation of California law.

Notably, the fact that most long distance carriers have adopted these provisions reflects the operation of the very marketplace forces on which the FCC now relies, absent evidence of market failure, to assure that the rates, terms, and conditions of service are just and reasonable. Regardless of whether interstate services are governed by tariff or by contract, the FCC has found that competition will prevent carriers from charging rates that are excessive or from imposing terms and conditions that are unreasonable, and that competition assures that where customers waive rights or remedies, they will do so in exchange for receiving lower rates than would otherwise be charged. See *supra* pp. 5-8. Thus, the fact that most major long distance carriers have adopted arbitration requirements and class actions bans reflects widely shared judgments that customers of long distance services place no or little value on rights to judicial and class remedies and prefer the lower rates that waivers of these remedies allow.

In this regard, while the FCC has not had any occasion specifically to rule on the lawfulness of such arbitration clauses and class action prohibitions in post-detariffing contracts, these provisions had been included in the tariffs of some carriers prior to detariffing, and were never disapproved by the FCC. *Metro East Ctr.*, 294 F.3d at 927-28. Further, the FCC's regulations specifically authorize customers and carriers to agree to resolve disputes through arbitration. 47 C.F.R. § 1.18. In addition, the FCC has held that the right of customers to bring individual complaints under § 208 (which the FCC is statutorily required to investigate and prosecute) fully protects their legitimate interests and that allowing

customers to bring complaints as class actions would be inconsistent with the remedial scheme of the Act. *Krauss* v. *MCI Telecomms. Corp.*, 14 FCC Rcd. 2770, 2775-76 (¶ 10) (1999). As the Seventh Circuit stated, these precedents strongly indicate that the FCC would reject claims that contractual arbitration requirements and class action bans are unjust and unreasonable under § 201(b) of the Act. *Boomer*, 309 F.3d at 421.

Second, whatever the FCC might hold on that specific question, it is very clear that the Ninth Circuit's holding that the lawfulness of the rates, terms, and conditions of interstate services can be governed by state unconscionability standards will subvert the FCC's regulation of competitive interstate services. State law unconscionability standards are fundamentally different than and incompatible with the standards that the FCC applies in determining if arrangements are unjust and unreasonable under § 201(b).

Here, for example, the Ninth Circuit held that the CSA's provisions are unconscionable because the CSA was a form contract that was not individually negotiated, because most long distance carriers had comparable provisions, and because the provisions were not reciprocal in the sense that the arbitration clause and class action ban – viewed in isolation – did not have the same practical effect on AT&T as it did on customers. App. 36a-42a. But under the FCC's standards, these factors are either irrelevant or powerful evidence of the reasonableness of the arrangement.

First, the fact that a provision is in a form contract (or tariff) has no significance under the FCC's policies. Mass market services were formerly governed by tariffs that customers never saw, and all mass market services inherently use form agreements. As other evidence and studies establish,[4] the FCC has found that competition in mass market

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[4] *See, e.g.*, Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L.J. 1297, 1319-47 (1981); ER 352-56, 388-90.

services will generally preclude the imposition of unfair or exploitive arrangements, whether or not form contracts are used. Second, under the FCC's policies, the fact that virtually all carriers in the competitive long distance market have similar provisions is – absent some evidence of market failure – conclusive or powerful evidence of their reasonableness. See *Metro East Ctr.*, 294 F.3d at 927. Third, the fact that an individual contractual term – viewed in isolation – has a greater practical effect on customers than carriers is irrelevant to its reasonableness under the FCC's policy. The FCC recognizes – as California law does not (in the Ninth Circuit's view) – that customers in competitive markets will be compensated for any relative disadvantage that results from a particular contractual provision in the form of lower rates for the overall service. *Id.*

Under the Ninth Circuit's view, California law would categorically preclude any term that is adopted in a form agreement, that is a feature of most competitors' services, and that is not "reciprocal" under the Ninth Circuit's narrow definition of that concept. For this reason, regardless of what the FCC might conclude about the lawfulness of the specific challenged provisions of AT&T's Consumer Services Agreement, the Ninth Circuit's decision that state law governs the lawfulness of such terms inevitably would result in the invalidation of a range of contractual provisions that the FCC would find to foster the public interest, to benefit consumers, and to be lawful under federal standards. This is an additional reason why review of the Ninth Circuit's decision is manifestly appropriate.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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